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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ALLEN DEE TAYLOR, Defendant and Appellant.	C080968 (Super. Ct. No. 14F05569)

THE APPEAL

Following his convictions for false imprisonment, assault with a deadly weapon, making criminal threats, and child endangerment, defendant Allen Dee Taylor appeals contending: (1) after imposing sentence for assault with a deadly weapon, the trial court should have stayed his sentences for false imprisonment and making criminal threats under Penal Code section 654 (statutory section references that follow are to the Penal Code unless otherwise set forth); (2) the trial court erred in failing to give a sua sponte

unanimity instruction on the criminal threats charge; (3) this court should conduct an independent review of the in-camera *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)) motion; and (4) his prior prison term enhancement should be stricken because the underlying conviction has been reduced to a misdemeanor.

We agree that section 654 prohibits sentences being imposed on the assault, false imprisonment, and making criminal threats convictions; accordingly, we will strike the criminal threats sentence and remand to the trial court for resentencing on the other two convictions. We also agree defendant's one-year enhancement must be stricken.

In supplemental briefing, defendant contends in light of the recent passage of Senate Bill No. 1393 (SB 1393), this matter must be remanded to permit the trial court to consider whether it should exercise its newly-granted discretion to strike or dismiss the prior serious felony conviction enhancement imposed under section 667, subdivision (a). The People agree SB 1393 applies retroactively, but contend remand is unwarranted as the trial court clearly indicated the court would not have dismissed the serious felony enhancement if it had the discretion to do so. We also agree the matter must be remanded to allow the trial court to exercise its sentencing discretion under sections 1385 and 667, subdivision (a) to strike or dismiss the prior serious felony conviction. We affirm the judgment of conviction and remand the matter to the trial court for resentencing.

FACTS AND PROCEEDINGS

Defendant and Darlene became domestic partners in 1996. In 2014, they lived with five children, all under the age of 10. In August 2014, defendant and Darlene got into an argument. Defendant was acting like he was coming down from a high, paranoid, and agitated. Darlene threatened to leave and put the children in the car. Defendant stopped her and they all went back into the house. At approximately 1:00 a.m., defendant called 911 and hung up without speaking to the dispatcher. When the dispatcher called back, Darlene told her the police were not needed.

Pursuant to sheriff's department policy, Deputies Chaussee and Spurgeon responded to the scene. Darlene answered the door and defendant was on the couch. Defendant appeared agitated and repeatedly asked the deputies why they were there. Darlene told the deputies she wanted to leave with the children because defendant was high on methamphetamine and defendant was preventing her from doing that. Spurgeon offered to stand by so she could safely pack and leave. Darlene accepted and went to pack her things.

Defendant began yelling he would not let Darlene and the children leave without him. He picked up a screwdriver with a 12-inch blade. Spurgeon drew his weapon, pointed it at defendant, and repeatedly ordered him to drop the screwdriver.

Defendant grabbed Darlene and said, "If you don't go away, I'm going to hurt her." He held her in front of him, alternating between pointing the screwdriver at her neck and her side. Spurgeon called for backup. Defendant made various comments to the deputies, including saying they better call for back up because "it's going to go down like this." He continued to have his arm around Darlene's neck, holding the screwdriver in his right hand against her neck. He held her in front of him with the screwdriver at her neck for about 20 minutes. At one point, he yelled, "If you don't shut up, I'm going to fucking kill you." Darlene yelled at him to drop the screwdriver and he was hurting her. She screamed and pleaded with defendant to let her go, and yelled several times, "He's going to kill me." Despite Darlene's and the deputies' requests, defendant refused to release Darlene.

As more deputies arrived, defendant positioned himself and Darlene between the deputies and the children. It appeared to Chaussee that defendant was using Darlene as a shield. Eventually the deputies rushed into the apartment and tackled defendant. He struggled with them, was tasered, then restrained.

At trial Darlene denied defendant had held her against her will. She denied he pointed the screwdriver at her neck or stomach, that he held her in a choke hold, that he

threatened to hurt anyone, or threatened to kill her. She claimed she had been afraid of the situation, but not that defendant would hurt her.

Defendant had a previous misdemeanor domestic violence conviction in 2007. Darlene had also obtained domestic violence restraining orders against defendant on two occasions: one in 2007 after he choked her and she escaped to her mother's house; and one in 2010 after he struck and threatened to hit her with a bottle.

An information charged defendant with false imprisonment of Darlene for purposes of protection from arrest (§ 210.5--count 1), false imprisonment of the children by violence or menace (§ 236--count 2), assault with a deadly weapon on Darlene (§ 245, subd. (a)(1)--count 3), making criminal threats to Darlene (§ 422--count 4), and child endangerment (§ 273a, subd. (a)--count 5). The information also alleged that defendant used a deadly weapon during the commission of counts 1, 2, 4, and 5 (§ 12022, subd. (b)(1)), had been convicted of one serious felony (§§ 667, subds. (b)-(i), 1170.12), and had served one prior prison term (§ 667.5, subd. (b)).

The jury found defendant guilty of the lesser offense of false imprisonment by violence or menace in count 1 (§ 236), guilty of the lesser offense of false imprisonment, a misdemeanor, in count 2 (§ 236), and guilty as charged in counts 3 through 5. The jury also found the weapons use enhancement alleged in count 1 true, but the remaining weapons use enhancements not true. In bifurcated proceedings, the trial court found the serious felony and prior prison term enhancements true.

The trial court sentenced defendant to state prison for 23 years eight months as follows: the upper term of 12 years for count 5, plus a consecutive term of 16 months for count 1, plus a consecutive term of two years for count 3, plus a consecutive term of 16 months for count 4. The court also sentenced defendant to one year on the weapons use enhancement alleged in count 1, five years on the serious felony enhancement, and one year on the prior prison term enhancement. The court imposed and stayed defendant's sentence on count 2 pursuant to section 654.

DISCUSSION

I

Section 654

Defendant contends the trial court erred in failing to stay defendant's sentences on the counts involving Darlene, counts 1, 3, and 4, under section 654. He contends the offenses were part of a continuous course of conduct with a single objective.

"Section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Thus, if all of the crimes were merely incidental to or were the means of accomplishing or facilitating a single objective, the defendant may receive only one punishment. (*Ibid.*) 'The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]' (*People v. Adams* (1982) 137 Cal.App.3d 346, 355.) When a trial court sentences a defendant to separate terms without making an express finding the defendant entertained separate objectives, the trial court is deemed to have made an implied finding each offense had a separate objective. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.) 'A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.' (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)" (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.)

"False imprisonment is the unlawful violation of the personal liberty of another." (§ 236.) In this case, the conduct which elevated the false imprisonment of Darlene to a felony is that it was affected by violence or menace. (*People v. Wardell* (2008) 162 Cal.App.4th 1484, 1490; *People v. Haney* (1977) 75 Cal.App.3d 308, 313.) "Menace is a threat of harm expressed or implied by words or act. [Citations.]" (*People v.*

Dominguez (2010) 180 Cal.App.4th 1351, 1359.) Both assault with a deadly weapon and making criminal threats are crimes which contain a threat of harm.

Here, the false imprisonment was effectuated by both the assault with a deadly weapon and the criminal threats. There is no evidence that defendant had any objective in committing these offenses other than preventing Darlene from leaving the apartment with the children. Because there is no evidence to support the implied finding that these offenses were committed pursuant to separate intents and objectives, section 654 prohibits punishment for all three offenses. Accordingly, the sentence on the offenses with the lesser penalty must be stayed. (*People v. Landis* (1996) 51 Cal.App.4th 1247, 1255.)

Making criminal threats is punishable by a term of 16 months, two, or three years (§§ 18, subd. (a), 422, subd. (a), 1170, subd. (h)); false imprisonment by violence is also punishable by a term of 16 months, two, or three years (§§ 18, subd. (a), 237, subd. (a), 1170, subd. (h)); and, assault with a deadly weapon is punishable by a term of two, three or four years (§ 245, subd. (a)(2)). Ordinarily, the assault with a deadly weapon would be the offense with the greater potential penalty of four years. Here, however, the felony false imprisonment also had a one-year deadly weapon enhancement attached to it which makes that potential sentence four years also. If the false imprisonment sentence is stayed, so must the attendant enhancement be stayed. (*People v. Kramer* (2002) 29 Cal.4th 720, 723.)

We will order the sentence on criminal threats stayed under section 654, and remand the matter to the trial court to exercise its discretion to sentence defendant on either the false imprisonment by violence conviction, with the deadly weapon enhancement, or on the assault with a deadly weapon offense, and stay the sentence on the remaining offense under section 654.

II

Unanimity Instruction

Defendant contends the trial court erred in failing to give a unanimity instruction sua sponte on the need for the jury to agree as to which of defendant's threats was the threat they found him guilty of that supports count 4. Defendant contends the prosecutor argued there were a number of threats against Darlene, and the prosecutor did not make an election between them; therefore, the trial court had a duty to give a unanimity instruction.

The California Constitution guarantees a criminal defendant the right to a unanimous jury verdict. (*People v. Jones* (1990) 51 Cal.3d 294, 321; Cal. Const., art. I, § 16.) In order to find a defendant guilty of a particular crime, the jurors must unanimously agree that the defendant committed the same specific act constituting the crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Crow* (1994) 28 Cal.App.4th 440, 445.) If the prosecution presents evidence of several acts, each of which could constitute a separate offense, a unanimity instruction is generally required, unless the prosecution elects one of the acts as the basis for the charged offense. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534; see *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1374-1375; *People v. Benavides* (2005) 35 Cal.4th 69, 101.) "The instruction must be given sua sponte if not requested. [Citations.]" (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1014, fn. omitted.) The purpose of the unanimity instruction is to prevent a verdict that results from some jurors believing that the defendant committed one act and others believing that defendant committed a different act, without agreement on what conduct constituted the offense. (*People v. Washington* (1990) 220 Cal.App.3d 912, 915-916; *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) Accordingly, when a defendant is charged with a single criminal act but the evidence reveals more than one instance of the charged crime, either the prosecution must

select the particular act upon which it relies to prove the charge or the jury must be instructed that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act. (*People v. Moore, supra,* at p. 1014; *People v. Brown* (1996) 42 Cal.App.4th 1493, 1499-1500.)

"Neither instruction nor election are required, however, if the case falls within the continuous course of conduct exception. This exception arises in two contexts." (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224; *People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.) The first, not implicated here, is when " 'the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]' [Citation.]" (*Jenkins,* at p. 299.) The second, applicable here, is "when (1) 'the acts are so closely connected in time as to form part of one transaction,' (2) 'the defendant tenders the same defense or defenses to each act,' and (3) 'there is no reasonable basis for the jury to distinguish between them. [Citations.]' [Citation.]" (*People v. Lueth* (2012) 206 Cal.App.4th 189, 196; see *People v. Williams* (2013) 56 Cal.4th 630, 682 [unanimity instruction may not be required where the " 'criminal acts . . . took place within a very small window of time,' " and " 'the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them' "]; *People v. Bui* (2011) 192 Cal.App.4th 1002, 1010-1011; *People v. Beardslee* (1991) 53 Cal.3d 68, 93; *People v. Stankewitz* (1990) 51 Cal.3d 72, 100; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 275.)

A unanimity instruction was not required here because this case falls within the second type of continuous course of conduct exception. Defendant's repeated threats, which were made over the course of the approximately 20 to 40 minutes it took to disarm and arrest him, were sufficiently closely connected in time as to form part of one transaction. There was no break in the acts, no period of time for reflection. As we observed above, defendant's intention throughout the entire ordeal was to prevent Darlene from leaving with the children. As these acts and threats were a continuous

course of conduct for purposes of section 654, so it was for purposes of unanimity. The defense to essentially all of the charges was that defendant did not take Darlene hostage, was not holding the screwdriver to her neck, and did not threaten her. Rather, he was defending his family from law enforcement who had escalated the situation by drawing their weapons and making it dangerous.

Counsel argued if defendant was not using the screwdriver as a weapon against Darlene, then the words, "I'm going to kill you," were not a criminal threat. Defendant offered the same defense to each of the alleged acts. He did not present any evidence that the threats did not occur and there was no reasonable basis for the jury to distinguish between them. Accordingly, a unanimity instruction was not necessary.

III

Pitchess

Prior to trial, defendant filed a *Pitchess* motion seeking discovery of the law enforcement personnel records of all 15 officers at the scene. The trial court conducted a hearing to determine whether good cause existed for the discovery request, and ordered an in-camera examination of any records that related to four of the officers. Following an in-camera examination, the court released the name and contact information of a complainant as to one of the officers, regarding a claim of excessive force. No other information was released.

Defendant asks this court to conduct an independent review of the sealed records of the trial court's hearing on his *Pitchess* motion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228, 1232.) The People do not oppose the request.

We will not disturb a trial court's ruling on a *Pitchess* motion absent an abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.) Having reviewed the *Pitchess* record, we find no procedural or substantive error in the trial court's handling of the motion. (See *People v. Myles* (2012) 53 Cal.4th 1181, 1208-1209.)

We note that there are some documents that were reviewed by the trial court which are not included in our record on appeal; however, the record reflects these documents were properly excluded as beyond the five year period that is discoverable. (Evid. Code, § 1045, subd. (b)(1); *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 9–10.)

IV

One Year Prison Prior Enhancement

In 2007, defendant was convicted of possessing methamphetamine and served a prison term. (Health & Saf. Code, § 11377.) In October 2015, the trial court sentenced defendant in the current case to an aggregate term of 23 years eight months in state prison, including a one-year enhancement under section 667.5, subdivision (b) for the methamphetamine conviction. Defense counsel made a motion to designate the conviction as a misdemeanor pursuant to section 1170.18, which took effect on November 5, 2014. The trial court denied the motion, as the conviction had not yet been redesignated. On April 27, 2016, the trial court granted defendant's petition to redesignate the conviction as a misdemeanor. On appeal, defendant contends his prior prison term enhancement allegation should be stricken, as the underlying conviction has been reduced to a misdemeanor under section 1170.18.

After briefing was completed in this case, the California Supreme Court issued its opinion in *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*).) holding "a successful Proposition 47 petitioner may subsequently challenge, under subdivision (k) of section 1170.18, any felony-based enhancement that is based on that previously designated felony, now reduced to misdemeanor, so long as the judgment containing the enhancement was not final when Proposition 47 took effect." (*Buycks,* at p. 879.)

As *Buycks* explained, the elements required for the imposition of a section 667.5, subdivision (b) enhancement, include " 'proof that the defendant: (1) was previously

convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.' (*People v. Tenner* (1993) 6 Cal.4th 559, 563.)" (*Buycks, supra,* 5 Cal.5th at p. 889.) Thus, when the prior underlying felony conviction is resentenced or redesignated to a misdemeanor conviction, an element required to support a section 667.5 one-year enhancement is negated. (*Ibid.*) "A successful Proposition 47 petition or application can reach back and reduce a defendant's previous felony conviction to a misdemeanor conviction because the defendant 'would have been guilty of a misdemeanor under' the measure had it 'been in effect at the time of the offense.' (§ 1170.18, subds. (a), (f).) Therefore, if the 'felony conviction that is recalled and resentenced . . . or designated as a misdemeanor' conviction becomes 'a misdemeanor for all purposes,' then it can no longer be said that the defendant 'was previously convicted of a felony' ([Citation]; *People v. Tenner, supra,* 6 Cal.4th at p. 563), which is a necessary element for imposing the section 667.5, subdivision (b) enhancement. Instead, 'for all purposes,' it can only be said that the defendant was previously convicted of a misdemeanor. [¶] Consequently, section 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under the measure." (*Id.* at pp. 889-890.) Since Proposition 47 took effect before defendant's judgment in this case was final, and his prior felony conviction has been redesignated "as a misdemeanor for all purposes," defendant no longer has that prior felony conviction. Accordingly, his one-year sentence enhancement under section 667.5, subdivision (b) must be stricken.

V

SB 1393

While this appeal was pending, the Governor signed into law SB 1393, "which, effective January 1, 2019, amends sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Prior to the enactment of SB 1393, and at the time defendant was sentenced by the trial court, section 667, subdivision (a) required imposition of a mandatory five year consecutive term for any person convicted of a serious felony who had previously been convicted of a serious felony. In his supplemental brief, defendant argues that this matter must be remanded to permit the trial court to exercise its newly granted discretion to decide whether to strike or dismiss the prior serious felony enhancement.

The People agree that defendant is entitled to the retroactive ameliorative effect of the amendment but argue that remand would be futile. According to the People, given the trial court's reasoning in denying defendant's *Romero* motion (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), remand is unwarranted because there is no reason to believe that the trial court would exercise its newly granted discretion to strike the prior serious felony enhancement.

We agree under the reasoning of *Garcia* that the recent amendments to sections 667, subdivision (a) and 1385 are retroactive and apply to this case. (*People v. Garcia, supra,* 28 Cal.App.5th 961 [holding SB 1393 applies retroactively to all cases or judgments of conviction in which a five year term was imposed at sentencing based on a prior serious felony conviction when the conviction is not final before the statute's effective date of January 1, 2019]; *In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

" 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, [our Supreme Court has] held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

We recognize that the trial court's sentencing choices and statements at sentencing suggest it would not exercise its discretion to strike the prior serious felony enhancement; however, that suggestion is not a "clear indication" and does not foreclose the possibility the trial court would have declined to exercise its discretion to strike defendant's prior serious felony conviction for sentencing purposes if it had the discretion to do so. (Cf. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand for resentencing because "the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence . . . by imposing two additional discretionary one-year enhancements" and describing the defendant as " 'the kind of individual the law was intended to keep off the street as long as possible' "].) Accordingly, we agree with defendant that remand is appropriate in this case to allow the trial court to exercise its discretion as to whether to strike his prior serious felony enhancement.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for resentencing on the false imprisonment by violence or menace (count 1) and assault with a deadly weapon (count 3) applying section 654 to one of the offenses, and to allow the trial court

to exercise its sentencing discretion under sections 1385 and 667, subdivision (a) to strike or dismiss the prior serious felony enhancement. The sentence on making criminal threats (count 4) is stayed under section 654. The one-year enhancement under section 667.5, subdivision (b) is stricken.

HULL, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.